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A New Role for the WTO in International Investment Law: Public Interest in the Post Neoliberal Period

by David Collins*

Introduction: A Multilateral Solution to Protectionism During Economic Crisis

International trade in goods and services has been largely liberalized by the World Trade Organization ('WTO') and its various agreements, including its well-developed system of dispute settlement and virtually universal membership. In contrast, foreign direct investment ('FDI') is managed through a patchwork of nearly 3000 bilateral or regional agreements with an array of dispute settlement systems operating under an assortment of rules. This situation is incongruous with the vast sums of capital involved. Total FDI inflows in 2007 were \$1.8 billion, and took place among both developed and developing states from all regions of the world.¹ Unfortunately foreign investment projects insulated by self-serving provisions in bilateral investment treaties ('BIT')s often interfere unduly the host states' regulatory power, at least as much as commitments relating to the free movement of goods, which conversely are tempered by clear exceptions. A global investment treaty has been impossible in part because of the reluctance of states to commit to standards of treatment of foreign investments in fear that this will surrender control over their own economic

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¹ World Investment Report 2008, United Nations Conference on Trade and Development, 28 Sept 2008, at xv.

governance, with potentially disastrous consequences. Yet paradoxically weaker regulations are often seen as an attractive feature of many developing states as destinations for investment. As such the developing states' greatest concern is that a multilateral instrument, perhaps conceived by the enlightened nations of the developed world, will impose labor and environmental standards that are too high. There are now more than 600 BITs between developing states and in 2007 outflows of FDI from the developing world remained at a high level of \$253 billion, mostly from South and East Asia.² Given these nations' reluctance to relinquish their comparative advantage in low regulation, it may be the states of the developed world who will become champions of the rights of citizens in the world's poorest countries whose governments are unwilling or incapable of addressing their grievances through international legal mechanisms.

The current inchoate nature of international investment law and problems of multilateralism must be considered in light of the predicted decline in FDI flows for 2008-09 resulting from the downturn in the world economy.³ Investment protectionism, erroneously perceived as a solution to many of the domestic economic woes, is on the rise worldwide.⁴ Recent government financial stimulus packages in many of the most economically powerful WTO Member states including the United States, the United Kingdom, Japan and China have financed institutions such as banks and automobile companies in a manner that represents a fundamental restructuring of the state's role in the economy that had characterized liberal democracies in the latter part of the 20th Century. This is nothing less than the end of the neoliberal period of

² World Investment Report at 8.

³ World Investment Report at xv.

⁴ OECD Strategic Response to the Financial and Economic Crisis: Contributions to the Global Effort, 2009 at 12. WTO Director Pascal Lamy cautioned that there has been significant slippage among the world's industrialized countries towards protectionism: 'Global Crisis Requires Global Solutions' 3rd Monitoring Report to the Trade Policy Review Body 13 July 2009

economic governance, a paradigm shift that is reflected to a degree in the growing role of sovereign wealth funds in FDI which are poised to become major players in the transnational flow of investment capital.⁵ Governments of the industrialized and industrializing world are now tied to the successes of the private enterprises which operate within their jurisdictions and this will color states' approach to multilateralism in international investment law.

While fears of protectionism heralded by this new period of government intervention in the economy may be assuaged by a commitment to the liberalization of investment through a global treaty, apprehension persists that FDI will inflict non-economic harm upon host states in the developing world, most notably through the treatment of workers and environmental degradation but also to their cultures. This may be compounded by the fact that the financial crisis of the latter part of the first decade of the 21st Century will have the gravest impact upon the developing world.⁶ The greatest risk of such public interest related transgressions may be from those states which have only recently begun to realize their potential as exporters of investment capital – the transition economies of the BRIC states (Brazil, Russia, India and China) which may view tighter regulation as an impediment to their immanent and deserved prosperity.⁷ The conflict can thus be characterized as a triangle of three states: the host state (typically in the developing world where labour costs and regulatory norms are lowest); the source state (increasingly transition economies which do not wish to adhere to raising awareness in the international community of environmental or human rights standards); and the non-party state from the developed

⁵ World Investment Report 2008 at 20

⁶ See generally Global Financial Crisis and Implications for Developing Countries, World Bank, G-20 Finance Ministers Meeting, Sao Paulo, Brazil 8 Nov 2008.

⁷ For example M Heymann writes that China typically assumes fewer obligations than its treaty partner and is "only cautiously accepting international obligations relating to investment protection". "International Law and the Settlement of Investment Disputes Relating to China" 11 JIEL 507 at 526 (2008).

world which, enlightened and prosperous seeks to impose standards of conduct on investors and hosts. A multilateral treaty in which the needs of all three categories of states are addressed is the only way in which public interest violations can be averted while achieving liberalization.

This article will argue that the WTO is well placed as an institution to implement a global treaty on investment as a means of ensuring the essential progress in FDI liberalization while maintaining appropriate standards for the preservation of workers, the environment and culture in vulnerable states. In particular this article will highlight the way in which WTO principles may further some of the key public interest issues that may arise in the investment context. It will suggest that the more inclusive and internally coherent nature of WTO dispute settlement is more responsive to public interest concerns than the private, largely inconsistent commercial arbitration of investment disputes. Part One will outline past attempts at achieving a global investment treaty as well as clarify why such an instrument is needed. The reasons that the WTO is well placed to accommodate such a treaty will be considered in Part Two and Part Three will evaluate specific approaches relating to the environment, labor and culture. Part Four will further the analysis of support for public interest norms through suggested modifications to the WTO dispute settlement system.

This article will not attempt to outline the content of a multilateral investment treaty comprehensively.⁸ It will not discuss definitions of investment or expropriation or standards of compensation, nor will it consider how such a treaty might implement the fair and equitable treatment or full protection and security standards of investment protection. While these remain controversial issues, there is a broad degree of

⁸ See e.g. Amarsinha and Kokott *generally Handbook On Investment Law* 138-151

consensus among the international community with respect to these concepts which is reflected in the remarkable commonality that has been observed among BITs.⁹

While some have described the implementation of a global investment treaty in conjunction with the WTO as a “remote possibility” after the suspension of the Doha Round of negotiations¹⁰, the need to establish of global investment rules is rightly viewed as “relevant as ever ... in terms of its implications for and interlinkages with the multilateral trading system.”¹¹ This is especially true now because of the worldwide economic crisis and the ensuing protectionist measures that have been implemented by many states. Before we embark on a discussion of how the WTO can accommodate such a treaty while maintaining sensitivity to public interest, the failures of the previous attempt to establish a comprehensive world investment treaty should be outlined as background.

I A Multilateral Approach to Investment Regulation

i) The failed attempts a multilateral agreement on investment

The history of the unsuccessful attempts to develop a comprehensive General Agreement on Tariffs and Trade (GATT)-type multilateral agreement on investment is well documented.¹² Briefly, a large part of the difficulty in reaching global consensus for the Organization of Economic Cooperation and Development (‘OECD’)’s Multilateral Agreement on Investment (‘MAI’) was that developing

⁹ E.g. A Lowenfeld “Investment Agreement and International Law” 42 Columbia J of Transnational L 123 at 128: “the mass of almost identical bilateral investment treaties constitutes international legislation.”

¹⁰ A Qureshi, “An Appellate System?” in Oxford Handbook at 1162

¹¹ Amarasinha and Kokott at 130

¹² See e.g. S Amarasinha and J Kokott, “Multilateral Investment Rules Revisited” Oxford Handbook at 119-153, P Muchlinski, “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?” 34 International Law 1033 (2002); K Kennedy “A WTO...”, J Kurtz, “A General Investment Agreement in the WTO? Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment” 23 UPAJIEL 713 (2002)

countries feared a loss of sovereignty¹³ and also because they were largely left out of the negotiation process, which was done in secrecy.¹⁴ Perhaps more importantly negotiations on the MAI failed because even the OECD members (representing the wealthiest nations in the world) were unable to agree on key terms. They sought exceptions to protect cultural industries from American dominance, and these provisions were naturally opposed by the United States.¹⁵ Furthermore, the approach to the agreement was one of negative listings: all sectors of the economy would be covered by the obligations from the outset and members would maintain reservations. Unsurprisingly, parties drafted numerous reservations, again, especially in cultural industries like cinema. This drafting technique also placed a heavy onus on negotiating parties to itemise their current measures accurately and fully describe each area where they wanted to preserve their regulatory rights.¹⁶ Some feel that the MAI was too ambitious in that it attempted to encompass both pre-investment and post-investment in one attempt. There was also a general unwillingness to compromise.¹⁷

The problems with the OECD's attempt at a multilateral agreement were rooted in its failure to address the special needs of the developing and transitional economies. With a clear priority of liberalizing FDI flows the OECD MAI inhibited developing states' ability to regulate investors, particularly in the expansive area of public interest – a field which could be readily abused to justify governmental interference. Although some states argued that the MAI needed to consider public interest issues like labor rights, the MAI contained only limited provisions on such standards, and to the extent that they were mentioned they operated only as loose

¹³ Weiss at 188

¹⁴ M Sornarajah, *The International Law on Foreign Investment* 2d ed (Cambridge University Press, Cambridge, 2007) at 292.

¹⁵ Arup at 490

¹⁷ Amarasinha and Kokott at 127

guidelines.¹⁸ This led to strong opposition among the NGOs which held a widespread apprehension that the MAI would not prevent regulatory competition, but rather would lead to a “Delaware Effect” at the international level, with states increasingly competing with each other for the lowest possible standards in order to attract presumptively beneficial investment.¹⁹ In particular NGOs argued that the agreement would undermine environmental standards and threaten organized labor.²⁰ The negotiation of a global treaty on foreign investment law is no longer on the agenda of any international organization at the moment.²¹

According to Muchlinski, the downfall of multilateral investment efforts by the OECD (as well as the World Bank and the WTO itself) were based in fundamental misconceptions about the nature of international economic relations during a time where policies of privatization and deregulation dominated. As such, attempts at liberalizing investment that were tied to the need to control governmental interference in the economy were misplaced.²² This view is surely accurate as the period of nationalizations which had unnerved foreign investors had ended decades earlier and, until the end of 2008, it seemed as though state intervention in economic affairs was part of the past. Indeed the anti-globalization movement of the late 1990s that helped derail multilateral efforts in investment may well have been a response to a lack of sufficient governmental involvement in these issues. The world economic crisis has changed this situation drastically since Muchlinski wrote those words in 2006. The

¹⁸ L. Compa, “The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection” 31 *Cornell International Law Journal* 683 (1998)

¹⁹ Arup at 490-491

²⁰ Amarasinha and Kokott at 126, cf. Muchlinski “Rise and Fall” who argues that the MAI failed to address crucial environmental and labour issues.

²¹ Subedi at 196

²² Muchlinski book at 668. See also K. Kennedy “A WTO Agreement on Investment” at 83-84 who argued in 2003 that foreign investors were generally content with the current regulatory framework, noting also increasing flows of FDI each year.

post neoliberal period and its attendant protectionism has made the call for renewed efforts in multilateral investment liberalization all the more urgent.

ii) Why a Global Investment Treaty is Needed

As suggested above, since the economic recession of 2008-2009, governments of the industrialized nations around the world have supplied massive financial stimulus packages to industries such as banks and car-manufacturing. This has been linked to fears of protectionist practices in trade, including notorious features of the US stimulus bill which privileged the use of American goods to the dismay of many Canadians and Europeans.²³ A worldwide effort to re-establish liberalization of investment is essential. Bilateralism cannot do this effectively for two reasons.

First, FDI requires regulation through a global treaty because it is difficult to draw a legal distinction between it and trade which is already managed at a global level through the WTO. This linkage is inescapable because common definitions of investment include things like licensing and sub-contracting which naturally involve a substantial trade element.²⁴ Moreover, there are strong commercial links between the trade and investment because companies engage in trade in order to supply their foreign investments and invest to promote trade.²⁵ Trade in goods and services often requires the establishment of a foreign subsidiary which necessitates the transnational flow of investment for the purposes of infrastructure and management.

Secondly the network of almost 3000 BITs each containing a Most Favored Nation (guaranteeing that the best treatment offered to one country be extended to all other countries) clause has created an incredibly complex array of obligations. This

²³ American Recovery and Reinvestment Act 2009 E.g. Section 1605 requires that all the iron and steel used for a public building be produced in the United States. NEWSPAPER ARTICLE?

²⁴ Weiss at 190

²⁵ N Di Mascio and J Pauwelyn, "Non Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" 102 AJIL 48 (2008) at 1.

raises compliance costs for the states and investors involved, which ultimately resorts in higher taxes and more expensive prices for consumers. Adding to the regulatory confusion are the many regional agreements on trade that contain investment provisions, such as Chapter 11 of the North American Free Trade Agreement ('NAFTA')²⁶ and the European Energy Charter Treaty ('ECT').²⁷ In addition to frustrating compliance with a multitude of treaty obligations, the existing patchwork of instruments dealing with international investment consisting of a variety of standards have led to problems of forum and treaty shopping for the purposes of dispute settlement.²⁸ Injured investors may bring a multitude of claims in various jurisdictions which represents a high cost to defending states, as well as a perception of disregard for the integrity of various local legal processes.

International investment dispute settlement is often described as suffering from a legitimacy crisis, in large part because of its lack of transparency and failure to address the broader needs of society as well as generally inconsistency and indeterminacy.²⁹ There is no hierarchy of investment tribunals, no system of precedent or appeals. This has resulted in much confusion with respect to the remedies available as well as the content of obligations, especially in relation to ambiguous concepts like public interest. A global investment treaty could resolve some of these problems by providing a centralized dispute settlement body with an appeals mechanism, some degree of deference towards previous decisions and greater transparency.

²⁶ 32 ILM 289 (1993) and 32 ILM 605 (1993)

²⁷ 34 ILM 381 (1995)

²⁸ See e.g. Weiss at 191 SUBEDI at 179, Dolzer and Schreuer at 25-27

²⁹ See C Brower, S Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law* 9 Chicago J of International L 471 (2009); M Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration" in K Sauvant ed *Appeals Mechanism in International Investment Disputes* (OUP, 2008); S Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" 73 Fordham L Rev 1521 (2005)

Multilateralism is advantageous furthermore because national legislation regarding FDI may offer inadequate legal protection for investors and for the host states.³⁰ Enhanced, predictable regulation within the host state in response to treaty obligation could contribute to good governance through the improvement of existing institutions like banks, courts and the economic system generally.³¹ Evidence suggests that broadly speaking liberalization of foreign direct investment is strongly correlated to overall productivity growth.³² In that sense a multilateral treaty can also be seen as an important development tool for host states.

Perhaps most significantly for the purposes of this article there is inconsistent protection of public interest concerns in the network of BITs and Regional Trade Agreements.³³ The legitimacy of free enterprises as polluters and exploiters of workers are seen as among the most pressing issues in the regulation of international investment and ones which were also crucially absent from previous multilateral efforts in this sphere.³⁴ Greater clarification of public interest norms through multilateralism will work towards protecting these important values. A global treaty would put pressure on investors from transition economies to conform to international standards when investing in developing states or else they will lose out on opportunities to invest in the developed world where such public interest standards are well-entrenched. As such a multilateral treaty could assist in a “race to the top” with associated benefits in quality of life for the most vulnerable people in society.

³⁰ K Kennedy, “A WTO Agreement on Investment: A Solution in Search of a Problem?” 24 University of Pennsylvania J of International Economic Law 79 (2003) who argues that the network of BITs are adequate.

³¹ Amarasinha and Kokott at 131

³² A widely cited study in this regard is K Ito, “Foreign Ownership and Productivity in the Indonesian Automobile Industry: Evidence from Establishment Data for 1990-1999 in T Ito and A Rose, Growth and Productivity in East Asia, NBER, University of Chicago Press, 2004).

³³ Amarasinha and Kokott at 146. See also generally O Chung “The Lopsided International Investment Law Regime and Its Effect on the Future of Investor State Arbitration” 47 Va J of International L 953 (2007)

³⁴ Muchlinski at 669

It should be noted that the existence of benefits for the host state such as literacy and health due to increased FDI are highly contested by commentators.³⁵ Perhaps equally contentious is whether treaty arrangements for the purposes of stimulating foreign investment actually achieve this aim.³⁶ If bilateral instruments have not augmented investment flows in signatory nations then a multilateral treaty may be equally pointless. While it is beyond the scope of this article to address these questions, it should be noted that a recent investigation into this issue conducted by Salacuse and Sullivan demonstrated that overall BIT ratifications have led to an increase in FDI over time.³⁷ As such it is at least plausible to infer that multilateralism would do the same. We will now consider how the institutional setting of the WTO would promote the establishment of a global investment treaty.

II) A Global Investment Treaty at the WTO

i) Institutional Advantages of the WTO

Establishing a global comprehensive treaty on investment through the WTO has been advocated by several commentators.³⁸ The obvious advantage is one of “institutional anchorage”³⁹ including an existing framework of rules and concepts, a developed dispute settlement process and a diplomatic setting which could facilitate negotiation of liberalization and incentivization through reciprocal concessions. The WTO is an

³⁵ Sornarajah at 53-55; David Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge U Press, Cambridge 2008) at 224-225

³⁶ E.g. J Yackee, “Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law: Do BITS Promote Foreign Direct Investment?” 42 *Law and Society Review* 805 (2008) (concluding that BITS have little or no impact on decisions to invest in a particular country). See also UN Conference On Trade and Development, *Bilateral Investment Treaties in the Mid 1990s*, Annex I at 159-217, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8. (1998)

³⁷ J Salacuse and N Sullivan “Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain” 46 *Harvard International Law Journal* 67 (2005), noting that FDIs between developed countries had only a weak positive effect on the level of FDI.

³⁸ Subedi at 197, Weiss at 191, K Kennedy “A WTO Agreement on Investment” at 178-180, E Petersmann, “International Competition Rules for Governments and for Private Business: A ‘Trade Law Approach’ for Linking Trade and Competition Rules in the WTO” 72 *Chicago Kent L Review* 545 at 560-561 (1996)

³⁹ Amarasinha and Kokott at 133

immensely successful international organization with almost universal membership and has a well established track record of effective negotiation of binding legal disciplines at the multilateral level.

The WTO may be the best forum for global investment regulation in developing countries. The WTO's principle of special and differential responsibility could be adapted to the investment context to address some of their particular concerns, such as the vulnerability of their workers, environment and culture to exploitation by investors, especially those from other developing states. Moreover, negotiations through the WTO should augment the bargaining power of developing countries by allowing them to form alliances with other similarly situated nations, which is impossible at the bilateral level where they typically have the investment agenda of the developed world forced upon them.⁴⁰ Alliances established for the purposes of trade could naturally be extended to the investment sphere. This is made possible by the consensus based nature of WTO negotiations, allowing all members to voice their views.

It must be recognized that the WTO already considered adopting an investment agreement. Investment was one of the issues discussed at the Fourth Ministerial Conference Doha Ministerial meeting in 2001 and the Doha Declaration included a tentative commitment to proceed with negotiations to include investment in WTO trade negotiations, largely driven by the urgings of the European Communities. Similar negotiations were unsuccessful at the Fifth Ministerial Meeting held in Cancun in 2003, largely because of the focus on agricultural subsidies.⁴¹ Developing states had limited resources to devote to negotiations and were focused primarily on securing special and differential treatment in trade

⁴⁰ Amarasingha and Kokott at 133.

⁴¹ Arup 493

especially in relation to textiles and agriculture rather than on liberalizing foreign direct investment.⁴² The WTO project also faced opposition from certain developing countries, such as India and Malaysia because of their concern that increased investment would harm domestic industries as well as a general suspicion that such a treaty would be no means guarantee increased investment flows.⁴³ With agricultural issues now perhaps beyond the possibility of negotiation, and with the increasing penetration of bilateral treaties along with evidence indicating that such agreements have stimulated FDI for the developing world, these latter problems may have subsided.

ii) Impediments at the WTO

Accommodating a multilateral treaty within the WTO would be problematic in some respects. As Subedi has noted, one of the main obstacles to multilateralism in the investment context is that, unlike BITs which typically expire within 10-20 years, a worldwide treaty on investment would be much more permanent, and this could represent an increased encroachment on state sovereignty. If the investment treaty were to form part of the core WTO obligations, then withdrawal from it would amount to a withdrawal from the WTO itself.⁴⁴ Perhaps most significantly, the WTO's current system of dispute settlement is available only to states – there is no provision for private causes of action and this would operate as a major disincentive for investors to link their projects to treaty based requirements in the absence of private, contractual provisions for dispute settlement.

Another major barrier to the establishment of a global investment treaty is that such an instrument may well be seen as law-making in the sense that it would

⁴² Matsushita, Schoenbaum 836

⁴³ Weiss at 189-190. That treaties stimulate FDI is still debatable see ABOVE NOTE.

⁴⁴ Subedi book at 195

contribute to international law binding on all states, rather than a *lex specialis*.⁴⁵ In addition to exacerbating difficulties in negotiating at a multilateral level, this would raise further concerns that states were establishing accepted principles which would ultimately undermine their own economic freedoms.⁴⁶ Of course the WTO itself is often considered a *lex specialis* in the sense that it does not contribute to public international law but is a separate autonomous treaty obligation.⁴⁷ This may rightly be seen as the price to pay for effective economic liberalization.

Problems with establishing an investment treaty at the WTO mirror those which would accompany such a treaty in any context, namely different approaches which nations take towards governance and their regulatory autonomy over the operation of enterprises within their borders. These difficulties have been noted in particular by Sornarajah who doubts that multilateralism will ever be possible because of the “ideological rifts and clashes of interest that attend this branch of international law.”⁴⁸ Other commentators have suggested that even among OECD countries there was extensive opposition concerning the application of treatment standards to the privatization of state-owned enterprises because of their differing traditions of government controlled economies versus *laissez faire* capitalism.⁴⁹ Walter cautions that a global investment treaty will lead to a “conflict of rationalities” of different national regimes.⁵⁰ It is hopeful that as states seek to attract foreign investment there will be a greater degree of universality at least with respect to the way in which regulatory governance is exercised (transparent, non-discriminatory) if not the nature

⁴⁵ Subedi at 195-196

⁴⁶ LOWENFELD ARTICLE suggests that BITs have already contributed to international law.

⁴⁷ Especially in relation to remedies: J Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (CUP, 2006) at 167

⁴⁸ Sornarajah at 269

⁴⁹ Amarasingha and Kokott, “Multilateral Investment Rules” at 127

⁵⁰ C Walter, “International Law in Process of Constitutionalization” in J Nijman and A Nollkaemper, *New Perspectives on the Divide Between National & International Law* (OUP, 2007) at 211

of the activities which can be regulated, meaning the precise definitions of investment.

Some commentators have suggested that the World Bank or the United Nations ('UN') may offer a more suitable institutional setting to accommodate a global investment treaty.⁵¹ Clearly the UN would represent the strongest support for the developing world's interests. Some have theorized that the United Nations Conference on Trade and Development ('UNCTAD'), or its Commission on Sustainable Development could develop or negotiate an investment treaty.⁵² There may be concern that such bodies might place too much emphasis on public interest issues to the detriment of economic ones. The UN's system of voting equality between states has ensured that developing states have an effective block such that the interests of the developed world (from which most investment capital originates) would be effectively ignored, possibly repeating some of the problems associated with the OECD based initiative. It should also be noted that UNCTAD, unlike the WTO does not have a history of successfully negotiating and implementing multilateral rules. Developmental concerns could be achieved through efforts of the World Bank, as indicated in part by its Multilateral Investment Guarantee Agency ('MIGA'). The International Centre for the Settlement of Investment Disputes ('ICSID'), which is an arm of the World Bank, could possibly be used to facilitate a system of global investment rules. ICSID clearly has specialized knowledge in the field of investment dispute settlement, especially between developed and developing countries. However its functionality as a forum for rule-making discussions is limited to its Secretariat, which may not have sufficient expertise in the field of large-scale negotiations⁵³ and

⁵¹ Subedi at 197, Arup at 492

⁵² Subedi 198

⁵³ Amarasinha and Kokott at 138

as we shall below see the current dispute settlement system of the WTO is in many ways preferable to that of ICSID.

If a multilateral investment treaty of all WTO Members were impossible to achieve as an obligatory requirement of WTO membership because of unwillingness to reach agreement on key issues, then the treaty could be attempted as a plurilateral optional agreement. If a plurilateral method is pursued, the question then becomes whether a “critical mass” can be achieved. This might be measured in terms of total FDI flows, rather than in terms of numerical accession of WTO Members. A very high level of FDI may be covered by a plurilateral agreement accepted only by developing states, but this would fail to liberalize emerging economies and developing states, where the concern for investment protection, as well as public interest issue violations is most acute.⁵⁴ However with an agreement in place applying to only some of the WTO Members there may possibly arise issues regarding to Most Favored Nation compliance.

iii) Existing Investment Instruments at the WTO

The WTO has already achieved a modest degree of regulation in the sphere of international investment. This demonstrates that the conceptual link between trade and investment has to a degree been successfully accommodated within trade focused instruments. For example, Di Mascio and Pauwelyn have noted parallels between the notion of National Treatment in both the trade and investment context.⁵⁵ For both trade and investment, they argue, there remains a common core obligation to ensure a level playing field between foreign and domestic entities which can be asserted by reference to objective evidence. Some of the differences observed in the

⁵⁴ Amarasingha and Kokott at 137

⁵⁵ N DiMascio and J Pauwelyn above NOTE X.

consideration of National Treatment in the investment and trade context are primarily technical and based on the ways that the tests for non-discrimination were historically developed by disparate dispute settlement bodies.⁵⁶

The WTO General Agreement on Trade in Services ('GATS') covers investment issues, but its scope is limited to the establishment of a commercial presence in a foreign state for the purposes of supplying a service, which is defined by reference to four modes of supply.⁵⁷ The third mode, commercial presence in the territory of another member, is relevant for the purposes of regulating foreign direct investment. The agreement is silent on the important issue of investment protection, focusing instead on market access and non-discrimination. GATS operates as a positive list approach - members may choose entire sectors to remove from national treatment and market access, a feature which has diminished the effectiveness of the instrument as a tool of liberalization.

Although similarly narrow in focus, the WTO Agreement on Trade Related Investment Measures ('TRIMS') requires that members must not apply any trade-related investment measures that are inconsistent with GATT 1994 obligations of National Treatment and the general elimination of quantitative restrictions. In that sense TRIMS essentially expands upon certain key features of the GATT.⁵⁸ Its most useful contribution to the law of international investment is its illustrative list of prohibited performance requirements, such as local product purchasing and export / import balancing requirements.

Finally, the WTO addressed investment issues through its Agreement on Trade Related Aspects of Intellectual Property ('TRIPS'). TRIPS achieves a high degree of protection for expropriation of foreign property in the context of intellectual

⁵⁶ Ibid at 82

⁵⁷ Art I

⁵⁸ S Amarasingha and J Kokott "Multilateral Rules Revisited" at 124.

property⁵⁹, which is typically included in the definition of investment in most BITs.⁶⁰

TRIPS expects governments to provide foreigners with legal protection against the threats to their intellectual property, albeit those which result from the unauthorized activities or measures of other private persons rather than governments.

Generally the presence of investment related agreements within the WTO Code demonstrate both the linkages between the two concepts as well as the potential to build a multilateral consensus regarding certain features of investment within the rubric of an international organization. The further capability of the WTO to provide a forum for a multilateral investment treaty can be seen in its attention to public interest matters, especially given that these concepts were developed in conjunction with the need to achieve and maintain liberalization, an ideology that is currently under assault during the worldwide economic crisis.

III Public Interest and the WTO Approach

Clarification of public interest issues, such as those involving the environment, labor and culture is a crucial component of investment regulation because a host state's efforts to regulate in these areas enable it to interfere with a foreign investment in a manner that would be otherwise unlawful. The distinction between legitimate and illegitimate measures in these areas will accordingly affect the calculation of compensation for the purposes of expropriation or violations of the fair and equitable treatment standard.⁶¹ The WTO is well placed to implement these concepts into treaty because of both the inherent flexibility of its deference to national standards as well as its appeal to universal principles, as embodied by the logic of the Agreement on

⁵⁹ Christopher Arup, *The World Trade Organization Knowledge Agreements*, Second Ed (Cambridge Studies in Law and Society, Cambridge 2008,) at 13

⁶⁰ E.g. United States - Uruguay BIT, Art I (2004)

⁶¹ Muchlinski book at 603

Sanitary and Phytosanitary Measures ('SPS'). We will identify the way in which the existing WTO concepts could be adapted to address the core issues of labor, environment, and culture as envisaged by international standards that have been developed in these areas.

i) *Labor Rights*

The concern over the mistreatment of labour by multinational corporations investing in foreign countries is rooted in the widely held belief that corporations locate abroad in order to reduce operational costs by lowering wages as well as the quality and safety of working conditions. Studies have shown that this is not necessarily the case and in fact many multinational corporations actually treat their workers substantially better than local employers, often because this is seen as being in their economic self-interest.⁶² However as countries like China with its much less advanced tradition of human rights guarantees continue to export capital to the developing world, we may see a reversal in this trend to affirm the traditional "sweat shop" profile. As such, treatment of workers will remain a key issue within international investment law. Many commentators have noted that multinational corporations have a moral duty to support fair labour practices among their workers⁶³ but this falls short of a legal obligation. Conversely there is an obvious concern that upholding labor rights will be used by a host state to justify expropriation or other interference with an investment. As such a multilateral treaty will need to strike a balance between the exploitation of

⁶² H Gorg, E Strobl, F Walsh, "Why Do Foreign Owned Firms Pay More? The Role of On the Job Training" IZA Discussion Paper No. 590 (22 Oct 2004), A Harrison, J Scorse "Do Foreign Owned Firms Pay More? Evidence from the Indonesian Manufacturing Sector" (ILO Working Paper No. 98, 2005)

⁶³ SUBEDI at 169. MUCHLINSKI ch 12, SORNARAJAH at 175-179. ALSO READ THESE ARTICLES: S Deva, "Human Rights Violations by Multinational Corporations and International Law: Where From Here?" 19 Connecticut Journal of International Law (2003) and S Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" 111 Yale LJ 443 (2001).

workers and the undue interference with legitimate business activities with satisfied employees.

Many U.S. BITs reference a desire to promote respect for internationally recognized workers' rights, but they do not contain substantive obligations in this regard.⁶⁴ Article 13 of the US Model BIT makes reference to internationally recognized labor rights, but it is phrased as a best-efforts attempt rather than a binding obligation.⁶⁵ NAFTA contains a provision which requires Members not to lower their labor standards as a means of attracting foreign investment and this has been sensibly recommended as a feature of any multilateral investment instrument.⁶⁶ The failure of the MAI to incorporate labor standards drawn from international organizations, including those which protect wages, job security should be viewed as a missed opportunity.⁶⁷ The establishment of certain minimum standards of treatment of workers could contribute to the positive reception of a global treaty by the developing world and would be consistent with existing trends in international law.⁶⁸ However, in reality it may well be the developing world that most resists the imposition of minimum labor standards through a global investment treaty as this would undermine their competitive advantage as suppliers of inexpensive workers. Commentators have pointed out how the developing world is suspicious of core labor standards as a hidden way of achieving protectionism against cheaper production costs.⁶⁹ It is for these reasons that the WTO has consistently maintained that it will not adopt labor standards within its trade liberalization regime. However the WTO has stated that it

⁶⁴ E.g. preamble to U.S. Bolivia BIT (1998) and U.S. Argentina BIT (1994)

⁶⁵ US Model BIT

⁶⁶ NAFTA 1114(20, recommended by J Kurtz "A General Investment Agreement in the WTO..." 23 U Pa J of International Economic Law 713 at 788 (2002)

⁶⁷ E.g. Compa above note XX

⁶⁸ Amarasinha and Kokott at 142

⁶⁹ K Raju at 315 "Social Clause in WTO and Core ILO Standards" in D Sengupta, D Chakraborty and P Banerjee, *Beyond the Transition Phase of WTO: An Indian Perspective on Emerging Issues* (New Delhi, Academic Foundation, 2006); see generally Matsushita, Schoenbaum and Mavroidis at 780.

will cooperate with organizations like the International Labour Organization so long as this does not interfere with natural comparative advantages in lower wages enjoyed by many developing states.⁷⁰ This demonstrates the WTO's willingness to support international standards while acknowledging a degree of leniency for the developing world.

The two major international instruments upon which a multilateral treaty could draw its rules in relation to the clarification of labour standards as an aspect of domestic regulatory autonomy are the OECD Guideline on Employment and Industrial Relations⁷¹ and the International Labour Organization Tripartite Declaration of Principles on Multinationals and Social Policy Declaration.⁷² In particular these voluntary instruments encourage multinationals as well as governments to promote freely chosen, productive employment, equality of opportunity and treatment, safe conditions of work and fair wages in terms of the satisfaction of basic needs.⁷³ In order to achieve this, both codes generally require treatment in accordance with national laws in operation at the place where the work is performed.⁷⁴ This is often phrased as a National Treatment standard: the conditions of work at multinational corporations should be no less favourable than those at comparable employers in the host state.⁷⁵ Similarly, the US Model BIT claims that parties will strive not to derogate from local labor laws.⁷⁶ Reference to the investor's conformity with a national labor standard would be highly instructive for assessing a host state's reliance on labor rights violations as a means of justifying expropriation of an investor's property or the violation of the fair and equitable treatment standard. An enlarged

⁷⁰ Matsushita, Schoenbaum, Mavroidis at 921-923

⁷¹ Part of the OECD Guidelines for Multinational Enterprises (Paris, OECD, 2000)

⁷² 17 ILM 422 (1978)

⁷³ See generally Muchlinski ch 12

⁷⁴ See eg. ILO Declaration [8] OECD Guideline [1].

⁷⁵ ILO Declaration [33]

⁷⁶ Art 13

National Treatment based standard for labor rights, perhaps by reference to working conditions in the host state generally rather than by reference to similar types of industries operated by local employers (which may not exist) would further accord a sufficient degree of national autonomy to ensure that a treaty with such terms would be ratified. Thus in nations where working conditions are normally low by comparison to those of the industrialized world, only conditions that fall below those already poor conditions would garner regulatory interference.

If domestic labor standards are at the highest level possible, given the economic status of the host state, yet still fall below some international standard, perhaps such as envisioned by the OECD or ILO codes then it may well be, at least morally speaking, to require foreign investors to accord better than National Treatment to their local workers given that it is within their economic power to do so. Of course such a burden may well diminish the rationale for foreign investment, as multinationals that are accountable to their shareholders will cease operating in foreign states if profits suffer. Labor costs should remain lower in developing states than they are at home, meaning that absolute costs should be lower and there will be no temptation to relocate to another jurisdiction of low regulation if the better than National Treatment standard follows the corporation wherever it goes. Furthermore, investing in improving the quality of life of the labor force could accelerate development and ultimately represent expanded market opportunities for multinationals, rather than a simply cost cutting strategy in the short term.⁷⁷

Deference to national standards has been criticized by Muchlinski as ineffectual in the prevention of regulatory competition among states for the lowest working standards – multinational corporations can still uphold both the OECD and

⁷⁷ Alan Griffiths & Stuart Wall, *Applied Economics* 11th Edition (Prentice Hall, Harlow, 2007) Ch 7.

ILO National Treatment requirements by locating in the state where workers are normally treated the worst.⁷⁸ This assertion is certainly correct, especially in the context of the triangle problem previously mentioned. A corporation from a transitional economy struggling to industrialize and correspondingly non-responsive to the spirit of western liberal goals that underlie these codes could seek to locate in a developing state where national standards are low. Without some benchmark minimum standard, National Treatment effectively ensures that workers will be exploited in some states that are eager to attract investment capital from abroad.

In addition to adopting an international standard for labor such as those suggested above, a global investment treaty could achieve balance between the fair treatment of employees and an investor's right to function without excessive regulatory interference through recourse to GATT general exceptions. Implementation of the same concepts and language could build upon the established jurisprudence and understanding that these exceptions have conveyed, augmenting clarity and increasing acceptance by the international community.

The only GATT exception which expressly deals with labor is the Article XX exception for products of prison labor.⁷⁹ However worker's rights could be accommodated through the protection of public morals⁸⁰ which is intuitively linked to the investment-based concept of public purpose, which typically operates as a justification for the expropriation of foreign property.⁸¹ Measures necessary to protect human life or health⁸² might also justify host state interference on the grounds of worker exploitation, especially in relation to dangerous working conditions, particularly in the extractive industries. The "necessary" qualifier for this exception

⁷⁸ Muchlinski at 477

⁷⁹ GATT XX e)

⁸⁰ GATT XX a)

⁸¹ E.g. US Draft BIT Art 6 a

⁸² GATT XX b)

could be instructive for investment purposes as well - only state action taken against investors that was directly for the purpose of protecting workers would be tolerated.⁸³ In keeping with the language of the Article XX chapeau, any use of such exception by the host state would have to ensure that their actions were done in a manner that does not constitute arbitrary or unjustifiable discrimination between countries (treating some foreign companies in the same industry differently than others), or a disguised restriction on international investment. Again GATT jurisprudence would be illustrative of these concepts and tests. As noted above, while Di Mascio and Pauwelyn have argued that the tests for discrimination in trade and investment are not identical, there is a broad degree of core commonality⁸⁴ and as such importing trade based exceptions to the investment context could be highly pragmatic. In addition, crucial WTO-based leniency for developing states will be examined further below.

ii) *Environment*

Equally important in the sphere of public interest is that of environmental protection, as it is often alleged that multinational corporations operating abroad have inflicted environmental damage on host states through their investment activities which have gone unchecked (or were even encouraged) because of deficient monitoring by the host state. Indeed, lax environmental regulations may be viewed as one of the attractive features of certain host countries, particularly in the developing world. This “pollution haven” theory is associated particularly with the extractive industries, such as iron and steel. It must be mentioned that there is now a large body of literature which suggests that there is actually little evidence that polluting industries relocate to jurisdictions with lower environmental standards in order to reduce compliance

⁸³ As distinct from “relating to”: see US-Shrimp AB Report WT/DS58/AB/R [135-142].

⁸⁴ DiMascio and Pauwelyn

costs.⁸⁵ In particular Jackson, Davey and Sykes note that the investments received by developing countries are not biased towards polluting industries but instead towards labor intensive industries that pollute less on average. Consequently environmental regulations are of limited importance to international investment law.⁸⁶ Still, some commentators feel that at a minimum, an international investment treaty must acknowledge the “polluter pays” principle, which is arguably a feature of customary international law.⁸⁷ Again the establishment of such a norm may be offensive to developing states seeking to incentivize investment by lowering environmental compliance costs and a multilateral treaty must be mindful of this.

When an environmental regulation significantly undermines the profitability of an investment, an investor may claim compensation under various BITs and RTAs including NAFTA. A number of ICSID cases have explored this issue: For example in *Metaclad*⁸⁸ damages were awarded when the company’s investment in a hazardous waste treatment facility which had been approved by the federal government of Mexico was later blocked by local authorities ostensibly for environmental purposes.⁸⁹ However investors are concerned that environmental measures could be used abusively by host states, much as host states, or at least the citizens of many host states fear that their local environment is being damaged for the sake of profits which will be expatriated. Greater regulatory flexibility is warranted here in order to achieve

⁸⁵ See e.g. A Harrison, “Do Polluters Head Overseas: Testing the Pollution Haven Hypothesis” Gianni Foundation of Agricultural Economics, UC Davis, 2002; J.M. Grether, “Globalization and Dirty Industries: Do Pollution Havens Matter?” CEPR Discussion Paper No. 932, June 2003; WTO, Trade and Environment 1-8 (Special Study No. 4 1999); A Abinmanyu “Impact of Free Trade on Industrial Pollution: Do Pollution Havens Exist?” ASEAN Economic Bulletin, Institute of Southeast Asian Studies, 1996.

⁸⁶ J Jackson, W Davey, A Sykes: *The Legal Problems of International Economic Relations* 5th ed (Thomson West, 2008) At 641

⁸⁷ Amarasinha and Kokott at 142. FIND AN ARTICLE DISCUSSING POLLUTER PAYS AS A FEATURE OF CUSTOMARY INTERNATIONAL LAW.

⁸⁸ *Metalclad Corp v Mexico* 40 International Legal Materials 36 (2001)

⁸⁹ See also *Tecmed* ; *Methanex* ; SJ Myers

a proper balance between environmental and commercial concerns. Existing WTO rules in this area may be instructive.

It remains a highly contentious issue as to what extent WTO rules can be said to implement international environmental norms.⁹⁰ There is no general exception from WTO obligations that is based on an international environmental agreement, such as the 1992 Climate Change Convention⁹¹ or the Basel Convention⁹² and no WTO panel has directly addressed the conformity of a multilateral environmental based trade measure with WTO rules. However, the WTO covered agreements do accommodate environmental concerns through the general exceptions of the GATT.⁹³ Environmental protection is missing from the General Agreement on Trade in Services (GATS) general exceptions.⁹⁴ WTO jurisprudence under the GATT exceptions is not undeveloped⁹⁵ and should provide useful insight for the purposes of issues arising from government efforts to protect the local environment from contamination due to an extractive project. Indeed the GATT environmental exceptions have appeared in some BITs, notably Canada's agreement with Ecuador where GATT articles XX a, b, and f of the GATT are repeated almost verbatim.⁹⁶ This reflects again the potential adaptability of legal principles developed in the trade

⁹⁰ See eg G. Sampson, *The WTO and Sustainable Development* (Tokyo: United Nations University Press, 2005), M Matsushita, T Schoenbaum and P Mavroidis, *The World Trade Organization: Law Practice and Policy* (Oxford OUP 2003) 439-484

⁹¹ 31 ILM 849 (1992). Note that most of the ICSID disputes which have involved environmental elements related to pollution to the local environment rather than to climate change. Above Note X.

⁹² 28 ILM 649 (1989)

⁹³ GATT Art XX: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: b) necessary to protect human, animal or plant life or health; g) relating to the conservation of exhaustible natural resources...

⁹⁴ Except for Article XIV b) "measures necessary to protect human, animal or plant life or health"

⁹⁵ Particularly in the reports of the Appellate Body in *United States- Reformulated Gasoline* WT/DS2/AB/R, *United States – Shrimp* WT/DS58/AB/R and *EC- Asbestos* WT/DS135/AB/R. The concepts are less developed under GATS.

⁹⁶ Art XVII.3 which states that nothing in the agreement should prevent either party from enacting environmental measures "b) necessary to protect human, animal or plant life or c) relating to the conservation of living or non-living exhaustible resources".

context to the investment sphere. However commentators have rightly observed that GATT Article XX exceptions were drafted well before the era of environmental consciousness and need elaboration in order to address fully issues like climate change. As such environmental protection in an investment instrument may wish to depart from the obsolete phrasing, if not the spirit of WTO provisions, in favor of more explicit directions.

The relative ambiguity of the GATT exceptions could be rectified through the creation of environmental standardization as achieved by the WTO SPS Agreement. This agreement allows Members to make their own decisions about health protection provided that they either conform to internationally recognized standards or the measures are based in scientific evidence.⁹⁷ The SPS may well be the most suitable model to craft environmental standards for investment activities because of this default reference to an international standard (which could easily be tailored to address fossil fuel emissions such as those reflected in the work of the UN Framework Convention on Climate Change). The SPS method is also advisable because it permits regulatory flexibility which should be amenable to developing and transitional states that are cautious to implement restrictive environmental policies lest they deter foreign direct investment. Like the GATT chapeau the SPS Agreement also prohibits any regulations that are disguised attempts at protectionism or discrimination.⁹⁸ These are all features that could be adapted into an environmental provision in a multilateral investment treaty.

There is much debate over the inclusion of environmental principles into international investment law in the form of minimum standards that should trump national laws or a National Treatment standard (foreign investments must adhere to

⁹⁷ E.g. Lowenfeld, *International Economic Law* 2d ed AT 412-413. SPS Arts 2.1, 2.2

⁹⁸ SPS Art 2.3

the same environmental standards as home investments). There is already strong consensus within international investment law that environmental issues must be considered when investment projects are undertaken. For example MIGA often requires an environmental impact assessment before offering coverage.⁹⁹ Several existing investment treaties also mandate environmental assessment as an essential feature of foreign investment projects, notably the ECT¹⁰⁰ and NAFTA.¹⁰¹ Recent BITs also require environmental performance requirements of foreign investment activities.¹⁰²

Some investment treaties include clauses which are aimed at addressing the risk that host states will lower their environmental standards as a means of attracting investment. As noted above, in NAFTA such a clause is phrased as a best-efforts obligation, stating that it is inappropriate for host states to encourage investment by relaxing domestic health, safety or environmental laws.¹⁰³ A similar provision can be seen in the US Model BIT and the US-Chile FTA.¹⁰⁴ Such obligations could prove to be a very effective means of disciplining the use of incentives by developing states to attract investment that could result in environmental damage. This method has been advocated by Qureshi as a crucial component of a multilateral investment treaty.¹⁰⁵

A universal standard established by an international body, such as the UN Commission on Climate Change, as an alternative to scientific evidence of environmental harm is arguably more warranted for environmental issues than labor ones because an individual's choice to subject themselves to what might be perceived

⁹⁹ MIGA Performance Standards on Social and Environmental Sustainability (1 Oct 2007)

¹⁰⁰ Art 19(1)i.

¹⁰¹ Art 1106(2)

¹⁰² US-Uruguay BIT Art 8(3)c AND A FEW OTHERS

¹⁰³ NAFTA 1114(2). NAFTA's Side Agreement on Environmental Cooperation has a complaints procedure concerning failures of contracting parties to enforce its own environmental laws, 32 ILM 1480 (1993).

¹⁰⁴ Art 12

¹⁰⁵ See e.g. "A General Investment Agreement in the WTO..." (2002) at 788

as unpleasant working conditions could also be viewed as an aspect of culture and an endemic feature of a given society. This is not the case with environmental damage where harm is often suffered by a victim in one country as a result of a foreign individual's decisions to pollute elsewhere. Indeed the developing world appears to be most vulnerable to the effects of climate change that apparently originated in the industrialized world. Accordingly, better than National Treatment in terms of regulatory norms of home as compared to foreign corporations may be desirable. However it should be recognized that most of the investment disputes involving environmental damage related to damage to the local environment.

It must be kept in mind that pollution abatement costs are typically not a major component of operating costs for firms¹⁰⁶ and as such tighter environmental standards may not be met with the degree of opposition that one might expect. Moreover tensions such as occurred in the *Metalclad* dispute could be avoided if environmental regulations are made more transparent from the outset, rather than after an investment project has already commenced at which point investors have already incurred significant costs. Predictability could be achieved through the implementation of provisions in the global treaty prohibiting disguised protectionism or simply mandating governmental transparency in the implementation of environmental policies. The WTO's status as an institution with a culture of transparency and openness should operate as an advantage in this regard.

iii) Culture

Culture is often cited as an important public interest concern in the context of trade liberalization because of the oppressive effects an influx of foreign commodities can

¹⁰⁶ A Harrison "Do Polluters Head Overseas" at 9

place upon the cultural products or cultural environment of economically weaker regions.¹⁰⁷ Commentators have noted the particular sensitivity of underwater archaeological sites.¹⁰⁸ State regulatory efforts to conserve the Giza pyramid region near Cairo which interfered with a hotel project led to the Wena Hotels¹⁰⁹ disputes at ICSID. Although perhaps economically unquantifiable, the value of cultural integrity is undisputed and can be especially vulnerable when associated with a developing nation that may be willing to sacrifice its cultural heritage for the purposes of attracting foreign investment.

As noted in the previous subsection, the WTO agreements have already drawn attention to this variety of public interest through exceptions in GATT¹¹⁰ and GATS.¹¹¹ So far no WTO Member has relied upon GATT XX to justify a cultural policy measure but the manner in which a Panel would evaluate such an argument is reflected in existing jurisprudence on the other GATT XX provisions, which may also shed light on how the GATS exceptions are to be construed.¹¹² While the concept of culture is inherently ambiguous, it would be difficult to argue that the Giza Plateau was not something of archaeological value. It may, however, be difficult to frame damage to a cultural site due to an investment project as a violation of human rights, as some commentators have suggested.¹¹³ Public morals is another highly indeterminate concept drawn from Article XX that could be implemented to protect

¹⁰⁷ See further T Voon, *Cultural Products and the World Trade Organization* (Cambridge U Press, 2007);

¹⁰⁸ See e.g. V Vadi, "Investing in Culture: Underwater Cultural Heritage and International Investment Law" 42 *Vanderbilt J of Transnational L* 853 (2009)

¹⁰⁹ *Wena Hotels v Egypt*, Award, 8 December 2000, 6 ICSID Reports 90, 41 ILM 896 (2002)

¹¹⁰ Art XX: measures a) necessary to protect public morals and f) imposed for the protection of national treasures of artistic, historic or archaeological value.

¹¹¹ Art XIV: measures a) necessary to protect public morals or maintain public order

¹¹² Voon at 100-104. It is noteworthy that the archaeological and artistic exceptions do not apply to services, suggesting that these exceptions were crafted with physical objects in mind.

¹¹³ See e.g. P Van den Bossche, *Free Trade and Culture: A Study of the Relevant WTO Rules and Constraints on National Cultural Policy Measures* 19 GET PROPER CITE FOR THIS. (2007); Voon and Vadi

cultural areas and without the safeguard of the chapeau it could lead to abuse. Again, trade jurisprudence could be highly illustrative for the purposes of investment. For example, the Appellate Body in *Korea-Beef* explained that the determination of public morals will involve the weighing and balancing of a series of factors, such as available alternatives and the importance of the interests protected by the measure.¹¹⁴ As Voon notes, such assessment will depend upon the relative value that the Appellate Body assigns to cultural values, like pyramids¹¹⁵ or morals, such as a beef processing plant in a region dominated by the Hindu religion. Public morals as standards of right or wrong from the perspective of a “community or nation”¹¹⁶ require input from that community or nation and this may necessitate a degree of public participation that is unavailable in many private arbitration tribunals, as will be discussed below.

The inherent adaptability of a public morals exception to the investment context is appealing however it would be difficult to argue that an international standard of morality could be conceived for the purposes of a multilateral instrument. Again, deference to a local standard in the spirit of the SPS Agreement may be warranted. Thus investment in a society that has a more expansive notion of moral acceptability (for example an Islamic state) may have greater latitude to claim justification for its treatment of foreign investment. Such a state would accordingly represent a greater risk as a host of a potentially culturally damaging investment project. Reference to a nation’s current internal policy on censorship or other existing legislation would offer an objective means for a panel to assess the credibility of its claim that a foreign enterprise was offensive to its public morals, much as the SPS tolerates a flexible approach to risk provided that there is some scientific justification.

¹¹⁴ Korea Beef [164]

¹¹⁵ Voon at 107

¹¹⁶ US Gambling [6.465]

A National Treatment standard may be inapplicable in the context of culture because a national industry may, merely by virtue of its local identity, sustain cultural values in a way that a foreign firm operating in the same sphere might not – indigenous restaurants would be a good example of this phenomenon. A NAFTA style provision prohibiting the lowering of local standards for the purpose of attracting foreign investment should be adopted in conjunction with culture. Still, the very notion of “lowering” may be inapplicable to a qualitative concept like culture (unlike a quantitative measure of a particular pollutant in the atmosphere for example). For the purposes of a multilateral investment treaty it may be advisable to use an SPS type reference to an external standard setting body, such as the UNESCO World Heritage designation as a presumptively protected location, interference with which would grant the host state the right to intervene, subject to the requirement that this was not done as a disguised restriction on investment as per the GATT XX chapeau. As noted above, the institutional structure of the WTO would ensure that any such restrictions would be transparent, minimizing the negative effects suffered by a foreign investor after an investment project had been undertaken.

iv) Conclusion: Contextual Compliance for Transition Economies

Public interest standards involving minimum protections to labor, the environment, or culture will be most burdensome to foreign investors from transitional economies like China, India and Brazil because of their limited capital resources relative to American, British and Japanese firms. The need to adapt standards in international investment law to suit the degree of development within a particular state is seen as an

essential component of ensuring compliance with a global treaty.¹¹⁷ A requirement that corporations from transition economies observe better than National Treatment standards in the host state is unlikely without some added incentive, such as a degree of leniency with respect to public interest norms. Similarly, developing states will be reluctant to sign on if they feel that their comparative advantage in lower labour and environmental standards will be negated. Critics of the current regime of international investment law, which is frequently depicted as investor-biased may be cautious that a multilateral treaty would grant further concessions to investors,¹¹⁸ but it is suggested that such views typically reference investors from the developed world, not those from nations such as China and India that are only beginning to recast themselves as exporters of investment.

In order to bring developing and transition economy Member states of the WTO to the negotiating table of a global investment treaty, there must be preferential treatment accorded with respect to the public interest obligations described above. This might be termed contextualized compliance and can be achieved through an adaptation of the WTO's provisions on special and differential treatment for developing state Members in their capacity both as sources and targets of foreign direct investment. There are numerous specific provisions in the WTO covered agreements which accord preferential treatment to developing country Members and most of these are explicitly trade related with limited relevance to the field of investment.¹¹⁹ The WTO agreements also generally offer a reduced level of

¹¹⁷ See generally E Alexander, "Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law" 48 *Virginia J of International L* 817 (2008)

¹¹⁸ See e.g. O Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration* 47 *Va J International L* 953 (2007); G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2007); Schneiderman *Constitutionalizing*

¹¹⁹ These include for example GATT Art XVIII (infant industries); GATT Art XXXVI (no expectation of reciprocity from developing states); GATT Part IV (generalized tariff preferences from developing states).

commitment, greater time periods for compliance and provisions for technical and financial assistance. This is perhaps best encapsulated by the so-called Enabling Clause which broadly states that: “contracting parties may accord differential and more favourable treatment to developing countries without according such treatment to other contracting parties” and further that such treatment “shall be designed to facilitate and promote the trade of developing countries and not raise barriers to or create undue difficulties of any other contracting parties” and finally “such treatment..[shall] be designed and if necessary modified to respond positively to the development, financial and trade needs of developing countries.”¹²⁰ Substituting references to trade therein with investment, this leniency could be applied to public interest requirements on the part of corporations incorporated in transitional economies. The party according the preferential treatment here would in theory be the host state, which may itself be a developing state, by allowing the foreign investor to provide *somewhat less* than the established standards (either by reference to an international norm or a national practice) as outlined above. The home state of the investor might equally find itself as the complainant in this regard, potentially arguing that the host state has failed to accord preferential treatment with respect to regulatory compliance.¹²¹ Thus the preferential treatment envisaged with respect to public interest in international investment would be the host state’s preferential treatment of investors from developing or transitional states as opposed to investors from developed states. This is in keeping with the WTO’s aim to provide flexibility for

¹²⁰ GATT Contracting Parties, Decision of 28 Nov 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries, GATT B.I.S.D. (26th Supp) at 203 (1980).

¹²¹ The Appellate Body has ruled that the complaining party must identify the particular provision of the Enabling Clause that has been violated and the responding party must then prove that it has satisfied the Enabling Clause that creates the exemption to GATT Art 1:1: EC-Conditions for the Granting of Tariff Preferences to Developing Countries: WT/DS246/AB/R (7 April 2004) [123-125]

developing states to meet their WTO commitments as well as the more specific proposals to make special and differential treatment more effective and operational.¹²²

In the case of environmental damage, the precise definition of “somewhat less” could either form a quantifiable level of emissions, or perhaps more practically for the purposes of negotiating a treaty, it could remain to be determined by the Dispute Settlement Body (‘DSB’). Polluter-specific emission targets linked to development status are in line with the Kyoto Protocol¹²³ and the principle of common and differentiated responsibility: developing countries assume limited binding obligations to reduce greenhouse gases.¹²⁴ This principle is reflected in the preservation of culture as well: the 1972 World Heritage Convention states that each state will make a best efforts approach based on its resources to preserve its cultural heritage,¹²⁵ meaning that some states will not be internationally responsible for failure to protect their culture if it is beyond their reasonable ability to do so. For labor, cultural or environmental issues equally, “somewhat less” than that expected of a multinational from a developed state could be quantified in terms of cost of compliance and the resources of the corporation in question and its ability to comply with various standards. The more wealthy or profitable the corporation is by some measure, the higher the level of public interest protection it must be prepared to grant, perhaps with a limited acknowledgement of the development status of the corporation’s home state.

¹²² Doha Ministerial Declaration WT/MIN(01)/DEC1 20 November 2001 [44]

¹²³ 37 ILM 22 (1998)

¹²⁴ M Weisslitz, “Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential Versus Absolute Norms of Compliance and Contribution to the Global Climate Change Context” 13 *Colorado J of International Environmental Law and Policy* 473 (2002)

¹²⁵ Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 U.N.T.S. 3 Art 4. See also the International Covenant on Economic, Social and Cultural Rights 1976 U.N.T.S. 3 Art 2.

Barriers to investment, like barriers to trade, are poor instruments of achieving public interest protection in developing states because in most circumstances they do not address the root problem, which is a lack of resources to improve the quality of working conditions, environmental sustainability and cultural preservation. By permitting foreign investors certain limited transgressions of these important standards, the economy of these host states can be improved through enhanced investment inflows such that these states will eventually be capable of raising their domestic public interest standards on their own. As long as this is done incrementally and transparently, such modifications to the regulatory sphere should not unduly interfere with the fair and equitable treatment or compensation standards sought by investors. Limited violations of public interest norms may be justifiable given that it will enable a developed state to raise its living standards in the long term.

IV) Public Interest and WTO Dispute Settlement

One of the primary ways in which the WTO can promote the inclusion of public interest in a global investment treaty is via its advanced, inclusive dispute settlement mechanism. Numerous commentators have observed how the current, de-centralized system of dispute resolution in international investment fails to satisfy public interest concerns because of its private investor – state format and associated lack of transparency.¹²⁶ The suitability of the WTO for investment dispute resolution will now be illustrated including some limited modifications.

iii) State-to-State Dispute Settlement

¹²⁶ SUBEDI AT 76, NOTTAGE AND MILES ARTICLE

Most disputes that occur in the sphere of foreign investment typically involve the investor bringing a claim against a host government for violation of the fair and equitable treatment standard, Most Favoured Nation or other principle provided under a BIT between the host state and the investor's state of incorporation. Disputes are brought before confidential neutral arbitral tribunals, often specified in the BIT, such as ICSID or an *ad hoc* tribunal operating under UNCITRAL rules. An onslaught of expropriation cases under NAFTA inspired by US Constitutional doctrines of regulatory takings have led NAFTA members to consider the possibility of eliminating these private rights of action against host states. The elimination of such mechanism from NAFTA in favor of a purely state-to-state model even featured as an issue in the 2008 Presidential election.¹²⁷ Some commentators, however, have urged that a direct right of action by investors is an essential means of redressing the power between a company and the host state where the former is at the whim of the host country's regulatory decisions.¹²⁸ Many investment disputes involve public interest concerns that necessitate representation through a state entity which, at least in theory, has the will of its citizens at heart. This situation is not adequately framed as essentially a one-off contractual dispute.

Rather than instigating a sweeping transformation of dispute settlement at the WTO to accommodate investor-state dispute settlement by allowing complaints from private parties¹²⁹, the best option is to retain the proven state-to-state model of the WTO using the DSB body as a mandatory forum for all disputes. In this way, the multinational corporation which has alleged injury by a host state must urge its home

¹²⁷ Jackson, Davey and Sykes book at 1121

¹²⁸ Brower and S something "Is Arbitration a Threat or a Boon to the Legitimacy".. 9 Chicago J of International Law at 471 at 482.

¹²⁹ FOOTNOTE ARTICLE WHERE THIS HAS BEEN SUGGESTED ALSO D McRae, "What is the Future of WTO Dispute Settlement" 7 JIEL 3 (2004)

state (as determined by the place of incorporation under international law)¹³⁰ to bring a claim against the host state, as would transpire through a conventional trade dispute, which is typically launched at the behest of private sector lobbying. This regime is in keeping with traditional international law where private investors did not have direct access to international remedies to pursue claims against foreign states, but instead depended upon diplomatic protection.¹³¹

As Brower and Schill have observed, many small or medium scale investors lack the resources to bargain effectively with host states to secure protection mechanisms¹³² much as they cannot afford international arbitration. State-to-state dispute settlement could redress this imbalance, provided that home states were willing to respond to the concerns of their corporate citizens and seek remedies through the WTO. A disaffected host state could request the establishment of a WTO panel to bring a complaint against the state of incorporation of the investor which it feels has violated the established multilateral treaty obligations, such as adequate labor standards. An offending “measure” in the language of the Dispute Settlement Understanding (‘DSU’) will in fact be an action by a corporation rather than a law imposed by the home state.

Commentators have criticized the utility of the WTO dispute settlement system as a means of addressing disputes between one private investor and a host government:

Dispute settlement under the WTO is fundamentally different in the sense that it deals with challenges to measures of a systemic nature affecting a range of traders, such as

¹³⁰ Case Concerning the Barcelona Traction, Light & Power Co. Ltd. (Belgium v Spain) [1970] ICJ Rep 3

¹³¹ The availability of diplomatic protection is typically contingent inter alia on the exhaustion of local remedies. R Dozer and C Schreuer, *Principles of International Investment Law*, OUP 2008 at 211. See also *Mavrommatis Palestine Concessions Case* PCIJ, Ser. A, No. 2.

¹³² Brower and Schill 9 *Chicago J of International Law* at 481-482

law, regulation or practice whereas investment dispute settlement will typically deal with specific steps taken which affect an individual investor and his investment...¹³³

This distinction collapses when one considers that many investment disputes involving large multinational corporations also affect significant groups of people where an environmental, labor or cultural issue is at stake, much as trade law violations harm a range of traders. In this sense, investment arbitrations as they currently stand are not truly private matters between a company and a host government.¹³⁴

Since investment disputes frequently encompass public policy concerns affecting many individuals they require a more public forum than that of a “businessman’s court” where arbitrators, who are chosen by the parties and do not hold public office, are concentrated exclusively on the resolution of the dispute at hand and not on its impact on the society in which the investment is located.¹³⁵ In contrast the WTO process of dispute settlement allows for consultations, has greater transparency in terms of the publication of decisions and rights of participation. Panel and Appellate Body members are chosen by a neutral third party and are mindful of the effects of their decisions on the world trading system rather than only on the parties to that dispute. The diplomatic tradition of the WTO and its practice of consultations could promote the attainment of settlement in the investment context, unlike the more legalistic, adversarial format of commercial arbitration.¹³⁶ Although the ICSID Convention presents conciliation as a viable option, it is rarely used in

¹³³ Amarasinha and Kokoff at 148

¹³⁴ See e.g. SUBEDI at 176, SCHNEIDERMAN at 76. Schneidermann notes that there is a trend towards greater openness in NAFTA proceedings as well as new BITs signed by the United States, many of which permit written submissions by third parties, although permit attendance at hearings only with the consent of both parties (Rules 37 and 32 of ICSID).

¹³⁵ G Van Harten, Investment Treaty Arbitration FULL CITE at 152-153, SCHNEIDERMAN, SUBEDI *ibid*.

¹³⁶ Qureshi “An Appellate System” at 1165

practice because it does not offer a definitive resolution.¹³⁷ This may be untrue were investment disputes to occur within the context of an established organization of Members accustomed to engaging in diplomatic negotiations.

The WTO appellate procedure would bring consistency and fairness to the current system of international investment arbitration. The lack of an appeal process at ICSID has been criticized by many and was cited as the reason for the departure of Bolivia from the ICSID regime. Furthermore, any concern that WTO panellists or Appellate Body members do not have sufficient expertise to adjudicate investment-oriented disputes could be met through the consultation with experts, as is done already for example under the Agreement on Subsidies and Countervailing Measures. While ICSID tribunals are only permitted to engage in inquiries for the purpose of obtaining information,¹³⁸ WTO panels are empowered to consult experts and seek information from any relevant source¹³⁹ suggesting a greater ability on the part of the WTO to assess technical information that may arise during the course of a dispute, for example scientific data relating to pollution.

A state-to-state system of dispute resolution through the established procedures of the WTO is the natural extension of the enhanced government role in economic affairs. The recent waive of nationalizations and bailouts in the banking and automotive industries demonstrate that governments have a more direct role in investment than they had played recent decades. As such the very concept of “lobbying” for government action at a tribunal like the WTO must be re-assessed. Governments will find themselves more willing to bring claims because of their vested interest in the success of corporations’ activities abroad. Moreover, the

¹³⁷ Dolzer and Schreuer, Principles at 221.

¹³⁸ ICSID Convention Art 43

¹³⁹ DSU Art 13 1) and 2)

growing role of sovereign wealth funds in FDI¹⁴⁰ implies that disputes in this field will increasingly involve direct use of state funds, obviating the need to re-design the WTO DSU to permit private rights of action.

iii) Reformed Remedies

If FDI is to be accommodated within the WTO dispute settlement system, the remedies available to the parties must be enhanced to address injuries particular to investment. First, a home state's powers to control the extra-territorial activities of their own corporations would need to be ensured for the purposes of compliance with DSB recommendations. Under Article 3.7 of the DSU a Member in violation of a WTO provision must bring the measure in question in conformity with its obligations by either modifying or withdrawing the offending measure. In the investment sphere a "measure" would be the regulatory actions of the host state that have interfered with an investment. But where it is the investor that is determined to have violated the treaty terms the offending measure would be the host state's failure to regulate properly the conduct of its corporate citizens abroad – this is because the investor itself would have no standing under the WTO regime. This transferral of liability may not always be legally purposeful as some home states have limited purview within their national laws to control the activities of their multinational corporations. Such powers must therefore be enhanced in order for states to participate in the multilateral investment scheme otherwise an international treaty-based obligation to regulate potentially unlawful actions taken by foreign investors would be meaningless.¹⁴¹

¹⁴⁰ World Investment Report 2008, UNCTAD at 20

¹⁴¹ A full discussion of the regulation of corporate activities abroad is beyond the scope of this article: See e.g. P Mulchinski, *Multinational Enterprises and the Law* 2nd ed (Oxford, 2007) Ch 4; M Sornarajah, *The International Law on Foreign Investment* 2d ed (Cambridge, 2008) ch 4.

Secondly, the provision for a withdrawal of concessions as retaliation for breach of trade obligations may need to be modified. It may be that the availability of retaliation through the withdrawal of trade concessions against an offending state should operate as sufficient means of enforcement of investment rules, although trade retaliation for investment wrongs may lead to a cascade of GATT violations with harmful economic effects. The withdrawal of concessions for investment treaty violation could be confined to the investment sphere – for example breach of a labor standard might result in the removal of a tax incentive. Still, under the language of the WTO DSU, remedies are forward-focused, concentrating on the removal of an offending measure to prevent future injuries rather concerned with compensation, which is typically the purpose of investment arbitration. This fundamental difference in approach necessitates a modification of WTO remedial principle by implementing monetary remedies in conjunction with the removal of the illegal behavior.¹⁴² Monetary compensation would approximate the awards that are typically granted by investment tribunals such as ICSID and as such would satisfy those who suffer the real injury of regulatory interference – the investing companies themselves, particularly if a cash award were channelled through to the investors by their home state. Monetary remedies would be an essential feature of a multilateral investment treaty as the cessation of an illegal action in the investment sphere may well be useless once the damage has been done: e.g. the local environment has been polluted or the value of the investment destroyed. Some provision for swift interim relief should be available to address situations where sudden expropriations hinder an investor's profits – these situations may not be adequately compensated by

¹⁴² See e.g. D. Collins, "Efficient Breach, Reliance and Contract Remedies at the WTO" 43(2) *Journal of World Trade* 225 (2009); M Bronckers & M van den Broek, 'Financial Compensation at the WTO: Improving the Remedies of WTO Dispute Settlement' 8 *JIEL* 101 (2005). Monetary compensation for WTO violations has been advocated by developing nations: Dispute Settlement Body, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17 (9 Oct 2002) at 15.

conforming laws to fit treaty obligations at some later time. This features in the powers of ICSID tribunals¹⁴³ and is essential to transform the WTO DSB to suit the investment context.

iii) Enhanced Accessibility

The process of dispute settlement within the WTO should be modified to accord greater participation by third parties in order to address fully the public interest issues in investment disputes. One of the clear advantages of the WTO DSB, as noted above, is the availability of public participation through the admission of *amicus curiae* briefs, which is typically absent from commercial arbitration. There is no provision in the UNCITRAL Arbitration Rules which permits tribunals to accept *amicus* submissions, although ICSID has recently amended its rules to allow non-party submissions under limited circumstances, including a significant interest in the proceeding.¹⁴⁴ While some commentators have applauded these improvements in transparency of ICSID procedures¹⁴⁵ there is still need for consent from the parties and this consent is typically absent in BITs, and RTAs, notably NAFTA Chapter 11. Moreover, under ICSID rules non-parties do not have rights in relation to the immediate proceedings, they do not get access to the arguments of either party or the specifics of the dispute. Non-parties are not allowed to dispute the submissions of parties or to present oral arguments. This is unacceptable given that investment disputes have the potential to affect the lives of citizens drastically.

The WTO Appellate Body has explained that it sees the *amicus curiae* device not as a right of participation but as a technique to assist panels and the Appellate

¹⁴³ ICSID Convention Rules 39, 47.

¹⁴⁴ ICSID Convention, Arbitration Rule 37.

¹⁴⁵ R Buckley and P Blyschak, "Guarding the Open Door: Non-Party Participation before the International Centre for Investment Disputes" 22 BFLR-CAN 353

Body in gathering information.¹⁴⁶ As such it is discretionary and rarely used. However, as noted above, WTO panels have the power to seek information and technical advice from any body which it deems appropriate in order to make determinations¹⁴⁷ and the Appellate Body has confirmed that panels have a wide discretionary authority to establish their own procedural rules for the purposes of investigating and assessing the issues within a dispute.¹⁴⁸ There is wide scope here for the involvement of NGOs, local associations or citizens groups in the decision making process. This is in addition to the more formal participation of standing or *ad hoc* WTO committees that may be assembled, for example on environmental or cultural matters. Such bodies could conduct surveys and studies as well as consult with experts to prepare reports for consideration by the DSB. Steger has suggested that WTO panels are often inundated with unsolicited *amicus* briefs and that procedural rules in this matter are required.¹⁴⁹ A multilateral investment treaty could offer an opportunity to establish such procedures, expanding the right of access by non-parties such that the interests of citizens are adequately represented.

The WTO should be commended for the transparency of its proceedings in terms of the reporting of disputes and other policy developments on its website and through the media. This is in sharp contrast to the sporadic publication of disputes on the ICSID website, largely due to parties' rights of confidentiality. Yet WTO hearings themselves should have greater public access. Currently only a small number of disputes are open to the public (the US and EU typically grant public access to their hearings). Moreover, the facilities of the WTO in Geneva should be enlarged to accommodate public galleries and the WTO may consider having other

¹⁴⁶ United States- Shrimp WT/DS58/ABR (6 Nov 1998) [99-110], United States – Hot Rolled Steel WT/DS138/AB/R (7 Jun 2000) [36-42]

¹⁴⁷ Art 13 DSU

¹⁴⁸ US Shrimp [104]

¹⁴⁹ D Steger *Peace Through Trade: Building the WTO* (Cameron & May, London 2004) at 230.

venues for its hearings outside of Geneva, possibly located in the host state where the investment dispute has occurred. Disputes should also be filmed and broadcast on the internet, perhaps with provision for citizens to submit comments via email, all of which could be reviewed, summarized and presented to the DSB at a later stage in the proceedings. In this way investment disputes engaging public interest matters could take on a more “town hall” type focus. These are not sweeping changes and would not require changes to the DSU or any of the covered agreements, but minor modifications of procedure. Naturally any commercially sensitive information, the existence of which is typically cited as justification for the confidential nature of ICSID proceedings, could be excerpted.

The accessibility of investment dispute settlement at the WTO may be impaired by the fact that the DSU requires exclusivity – Members may not pursue actions against each other in other fora for redress of WTO covered agreement violations.¹⁵⁰ As such, opportunities for private litigation against investors would be precluded, such as those currently permitted by the U.S. Alien Tort Claims Act 1789, or the jurisdiction that has been recognized by the United Kingdom House of Lords.¹⁵¹ While such claims may be forbidden under the auspices of the WTO, it is unclear whether a federal court of, for example the United States or the United Kingdom would refuse to take jurisdiction over such a claim against a domestically incorporated enterprise because this would be perceived as a violation of international treaty law. A specific provision barring civil claims in a WTO investment treaty would achieve this. We might expect that given full accessibility and lower costs through WTO dispute settlement, such private civil actions would be unlikely as they would represent more expensive, time consuming and ineffectual means of dispute

¹⁵⁰ DSU Article 23.1

¹⁵¹ *Lubbe v Cape* [2000] 1 WLR 1545

settlement. Alternatively, were a private complainant to attempt to re-litigate a claim through a civil court of the jurisdiction of incorporation following his home state's failure at the WTO DSB, a domestic court should view the matter as *res judicata*. Again, a provision to this effect in the text of the treaty would resolve the multiplicity of claims problems that could ensue otherwise. Recourse to ICSID or other arbitration tribunals as per previous BITs would need to be similarly precluded. Accordingly we should expect that these tribunals would decline in relevance.

WTO dispute settlement is accessible for the purpose of protecting public interest also because Members do not require "standing" to bring a complaint against another Member.¹⁵² This means that there is no requirement for a Member to have a "legal interest" as a condition for requesting the establishment of a panel. More important for the purposes of addressing public interest violations by transitional states, the DSU states that panels must take into account the interests of other Members and that Members having a substantial interest have an opportunity to be heard and make written submissions.¹⁵³ This flexibility is absent from ICSID, which requires that both the party of the investor and the disputing party must be parties to the Convention.¹⁵⁴ However, the DSU also states that it is not appropriate for third parties in a dispute to allege nullification or impairment to another Member's interests, nor can the third party establish the legal claims comprising the dispute.¹⁵⁵ A third party therefore does not have the right to make claims in a dispute. Thus, under the state triangle motif, where an allegedly injured developing country seeking to profit from poorly regulated foreign investment from a transitional economy denies that it has suffered any ill affects as a result of the respondent's actions, there is no

¹⁵² EC-Bananas, AB Report, WT/DS27/AB/R (25 Sept 1997) [132-138]

¹⁵³ Arts 10.1 and 10.2

¹⁵⁴ Art 25

¹⁵⁵ Art 10.4 and also e.g. US-Customs User Fee, Panel Report, BISD (35S/245 [124])

provision for a third state to bring a claim on behalf of the injured citizens of the developing country.

It is conceivable, however, that a third party Member state could instigate the a dispute on the basis of the violation of an environmental standard in a host state by an investor incorporated in another, different state on grounds that the third state's interest in the sanctity of the global environment were at issue.¹⁵⁶ This rests on the reality that environmental damage in particular localities can have worldwide effects. A similar argument might be made of cultural institutions that are valuable to the world, such as the Giza Pyramids. Such an approach would be less tenable with respect to labor issues as they are inherently local, although unfair treatment of workers could arguably be viewed as morally repugnant to the whole world.

Alternatively, the never-used third type of WTO complaint that "any objective of the Agreement is being impeded as the result of any other situation"¹⁵⁷ might allow for a third party claim against an investor which has violated a public interest norm in the host state, with the host state's tacit approval. While Lowenfeld holds that this provision is essentially meaningless¹⁵⁸ it may develop a new significance in the investment context, addressing situations where Member governments are being illegitimately tolerant of public interest violations for the purposes of economic growth in a macroeconomic sense. The growing attractiveness of the developing world as a destination for FDI necessitates close monitoring to prevent public interest violations and the instigating of disputes by third parties Members is an important way to achieve this. The DSU should consequently be modified to allow for third

¹⁵⁶ A similar justification was used to ground a complaint from the United States in EC-Bananas WT/DS27/AB/R.

¹⁵⁷ GATT Art XXIII (1)c

¹⁵⁸ Lowenfeld, *INTERNATIONAL EC LAW* 2ND ED (Oxford U Press, 2008) at 191. Matsushita, Schoenbaum and Mavroidis describe the situation complaint as nebulous and of very limited utility: *The World Trade Organization: Law, Practice and Policy* at 122 (OUP, 2005).

parties, typically developed states with an advanced concept of public interest, to bring claims alleging the nullification or impairment of investment treaty benefits suffered by others.

V Conclusions and Further Thoughts

The adaptations of international standards and the existing principles of the WTO must be viewed in light of the changes that have occurred in the management of economies by national governments in the period following the recession of 2008-09. The ensuing bailouts of financial and other industries are rightly characterized as heralding a post neo-liberal period in which liberalization of economic relations between states must no longer be taken for granted. Just as UNCTAD reports that FDI levels are set to decline in 2009, trade protectionism has re-emerged as a means of redressing the financial hardships suffered by numerous industries, as seen for example in the buy-American provisions of the American Recovery and Reinvestment Act 2009¹⁵⁹ and in warnings from the WTO regarding transgressions in trade commitments.¹⁶⁰ The need to re-establish liberalization in investment (as in trade) is clear and a multilateral agreement on aimed at promoting investment would assist in achieving this goal. In the past such an instrument may have been unnecessary, as demonstrated by strong increases in FDI over the past decade, and this may account for the previous failure of a multilateral agenda.

However the pursuit of liberalization in investment must not be at the expense of important public interest matters, as have been identified in this article.

Environmental, labor and cultural standards are at risk especially because of the increasing role of developing and transitional states in international investment which

¹⁵⁹ Above note X

¹⁶⁰ ABOVE NOTE LAMY

may act in their own interests at the expense of their vulnerable citizens. Transitional states like India and China have already begun abandoning their position against international regulation of investment, which heretofore had been viewed as an assault on their sovereignty.¹⁶¹ Similarly, these states will begin to feel protective of investments pursued by their own corporations in part because of growing state participation in economic affairs, especially as these activities become more numerous and capital intensive. Multinational corporations from these states will accordingly resist efforts of host states to regulate in the sphere of public interest when this results in a deprivation of property or profits. While it has been noted above that commonly held views about pollution havens and exploitative labor practices may be untrue, further expansion of transitional economy investment abroad may lead to these hypotheses shortly becoming a reality. While in the past developing states may have been willing to sign BITs that bound them to public interest norms, the world economic decline may lead these countries to abandon their commitments in order to survive and reach a level of equality with the developed world. Until the developing and transitional states have achieved the level of wealth that is enjoyed by the wealthiest nations, public interest issues may remain an indulgence for these states, and the effects on their citizens, the environment and culture could be devastating.

An investment treaty must therefore control the use of investment incentives in the form of weak regulation employed by the developing world that may have a detrimental effect on these important matters. This article has identified key public interest areas where international standardization, coupled with a degree of leniency that recognizes development status could be achieved through a modification of

¹⁶¹ Amarasinha and Kokott at 132

existing concepts drawn from the WTO, including importantly, the process of its DSB. The suitability of WTO law for the purposes of a global investment treaty is predicated on the presumption that Member states will be more willing to adhere to concepts with which they have a degree of familiarity, especially where this has arisen in the analogous context of trade regulation.